

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

NASH FINCH COMPANY¹

Employer

and

UNITED FOOD AND COMMERCIAL WORKERS
DISTRICT LOCAL 431

Petitioner

Case 18-RC-17553

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²

¹ The Employer's name appears as amended at the hearing.

² The Employer, Nash Finch Company, is a Delaware corporation with an office and place of business in Cedar Rapids, Iowa, where it is engaged in the distribution of food products. During the past calendar year, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Iowa, and sold and shipped goods and materials valued in excess of \$50,000 directly to points outside the State of Iowa.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Petitioner seeks a unit of essentially warehouse employees employed by the Employer at its Cedar Rapids, Iowa facility. Petitioner and the Employer agree that the following classifications should be in the unit: inventory control employees, janitors, maintenance employees, order selectors, quality control employees, receiving employees, recoup employees, sanitation employees, shipping employees, forklift operators and lead employees. Petitioner and the Employer also agree that office clerical employees, guards and supervisors as defined in the Act should be excluded from the unit. However, where the Employer and Petitioner disagree is with regard to the status of the Employer's truck drivers and transportation maintenance employees. While the Employer argues that they must be included in the unit, Petitioner maintains that they may be appropriately excluded from the unit.

The first section of this decision is a description of the Employer's Cedar Rapids operation, including the supervisory hierarchy and the jobs of both agreed-upon unit employees and employees in dispute. Next, I describe the role of supervisors, focusing particularly on the job duties of the supervisor of truck drivers and transportation maintenance employees. The third section summarizes the Employer's benefit and compensation program, as well as some working conditions, as they relate to agreed-

upon unit employees and to the employees in dispute. The next section briefly explains the Employer's method of recognizing seniority. Fifth, I describe in detail record evidence regarding day to day interchange between warehouse employees and the drivers and transportation maintenance employees. I next provide a history of permanent transfers, when warehouse employees transfer to truck driver jobs, and vice versa. Finally, I explain my conclusion that truck drivers and transportation maintenance employees do not share a community of interest with warehouse employees sufficient to require their inclusion in the unit.

The Employer's Operation

The Employer receives perishable, dry and frozen food at its Cedar Rapids facility; temporarily warehouses this food; and then ships the food to customers (retail stores) located in the States of Iowa, Wisconsin, Minnesota and Missouri. The food arrives at the Employer's facility by truck. Drivers of the trucks delivering product to the Employer's facility are not necessarily employed by the Employer.³ Drivers delivering the food check in, are assigned a door, and back the truck to the dock. The food being delivered is unloaded by employees of the Employer, who also stage the food on the dock so that fork lift operators can more easily pick up the food and place it on storage racks. With regard to filling orders for delivery by the Employer's truck drivers, the Employer's warehouse employees pull product off the storage racks using forklifts, fill the orders, stage the pallets of food on the docks, and the food is then loaded onto

³ The record is not clear as to how many drivers (if any) delivering product to the Employer's facility are employed by the Employer.

trucks for deliveries to retail stores. Drivers who deliver the food to retail stores are employed by the Employer.

Division Manager Ron Rude has overall responsibility for the Employer's Cedar Rapids operation. Reporting to Rude is the Distribution Director – a job that is currently unfilled. Reporting to the Distribution Director are various supervisors. They include Shipping Manager Larry Nesbitt, Receiving Supervisor John Lemon, Maintenance Supervisor Steve Russell, Inventory Control Supervisor Ryan Torson, and Drivers and Transportation Maintenance Supervisor Patti Cole. Reporting to Shipping Manager Nesbitt is Shipping Supervisor Erik Sweirk. The Employer and Petitioner stipulated that all of these positions are supervisors within the meaning of Section 2(11) of the Act.

The record also summarizes the duties of those classifications which both parties agree are in the unit. Thus, inventory control employees monitor inventory including making sure that the computer inventory is correct. Also in the unit is the janitor, who cleans the restrooms, breakrooms, warehouse and office area, as well as sanitation employees, who clean the warehouse. Receiving employees unload the food and stage it on the docks. Then forklift operators move the food from the dock to the storage racks. Order selectors take orders from the computer in the shipping office, and fill the orders by building pallets of food reflecting the orders. They are supervised by Shipping Manager Nesbitt and Shipping Supervisor Sweirk. Shipping loaders, also supervised by Nesbitt and Sweirk, load the pallets put together by order selectors onto the trucks for delivery to retail stores. To do so, they use forklifts. Recoup employees handle food damaged in the warehouse and store returns, while quality control employees inspect produce during receiving. According to both parties, leads are "hourly supervisors," but

not supervisors within the meaning of the Act. There are a total of about 70 warehouse employees, most of whom are full-time employees.

Also employed by the Employer are 29 truck drivers and three transportation maintenance employees. These are the employees in dispute in this proceeding. The 29 drivers have assigned routes to customer stores and, obviously, deliver food to those stores. They may also bring product back from the stores. Of the 29 drivers, 90 percent are home every night, and therefore not required to be gone overnight in order to complete their routes. The transportation maintenance employees perform “light repair” (not further defined in the record) and maintenance for the fleet of trucks.

The Role of Supervisors

Drivers and Transportation Maintenance Supervisor Patti Cole interviews applicants interested in jobs in her area, recommends and implements discipline for drivers and transportation maintenance employees, organizes bids for schedules (explained further below) and maintains contacts with customers. The Employer’s Distribution Director reviews and approves Cole’s recommendations. Shipping Manager Nesbitt interviews applicants for jobs in the shipping area, and both he and Shipping Supervisor Sweirk recommend and implement discipline. Again, the Employer’s Distribution Director reviews and approves Nesbitt’s or Sweirk’s recommendations. There is no evidence that any supervisor, other than Patti Cole, hires, disciplines or supervises drivers and transportation maintenance employees, and there is no evidence that Cole hires, disciplines or supervises employees other than drivers and transportation maintenance employees.

Benefits, Compensation, and Working Conditions

Except for one incentive program, benefits are the same for all employees, including office clerical employees and managers.⁴ This includes vacation policy, holidays, personal days, leaves of absence, discounts, educational scholarships and assistance, bereavement pay, jury duty, 401(k) program, life, disability, vision, medical and dental insurance, flexible spending accounts, work rules and disciplinary policy, parking area, company appreciation events, bonuses and service awards. There is one handbook covering all employees.

There is, however, one incentive program available to some (but not all) warehouse employees and not available to any other employees. It pays employees above their wage rate when they are more productive than a standard set by the Employer. However, warehouse employees who unload trucks, who maintain inventory, or who are involved in maintenance, sanitation or recoup are not included in the incentive program.

In addition, only maintenance employees in the warehouse and the transportation maintenance employees wear uniforms. These two classifications of employees wear the same uniform.

Employees stipulated to be in the unit are hourly paid, punch a time clock and start at \$13.96. Their top hourly rate is \$18.45, and it takes two years to reach the top rate. Transportation maintenance employees are also hourly paid and punch the same time clock as warehouse employees. However, Employer HR Representative Glover

⁴ The Employer's sole witness, HR Representative, Safety Manager, and Assets Manager Dennis Glover, was not sure whether managers have a different sick day policy.

did not specify the hourly wage rates of the transportation maintenance employees. Rather, according to him, the warehouse employees and transportation maintenance employees “are in the same general range,” as warehouse employees, with a “premium” of 50 cents per hour being paid to the transportation maintenance employees.

On the other hand, truck drivers do not punch a time clock, and receive both hourly pay and mileage. Apparently their hourly rate is about the same as warehouse employees, and they receive over 40 cents per mile driven. HR Representative Glover testified in a very general fashion that the range of wages on an annual basis for warehouse employees and the range of wages on an annual basis for drivers are “pretty close to the same.” On the other hand, a driver who was required to move from a driver position to the warehouse in 2007 due to a medical issue testified that he lost about \$20,000 per year when he moved to the warehouse.

While the vacation benefit is the same for all employees, because of the differing methods of compensation, measuring vacation compensation also differs. As a result, a week of a driver’s vacation pay is determined by using the average weekly pay of the driver over 12 weeks, while a warehouse employee receives 40 hours of pay. This differing method for determining vacation pay also suggests that the annualized wages of warehouse employees and drivers are not “pretty close to the same” as suggested by the Employer.

Drivers bid on routes every six months. They are required to maintain trip logs by the U.S. Department of Transportation. Unlike warehouse employees, drivers do not have scheduled breaks, including for a meal.

Use of Seniority

Separate seniority lists are maintained for general warehouse employees, for drivers, for warehouse maintenance employees, for transportation maintenance employees, and for sanitation employees. Thus, if an employee in one of these groups moves to a job in another group, the employee loses his/her seniority and must start over.⁵ This affects the employee's ability to bid on jobs. This loss of seniority is not permanent. That is, if an employee returns to his/her old area, the seniority previously earned in the area is restored.

The most dramatic example of the impact of this seniority system is the employee transferred to the warehouse in 2007 due to a medical issue. For purposes of bidding on jobs in the warehouse, he lost his 35 years of seniority earned as a driver. Should he be able to return to a driver job in the future, that 35 years of seniority will be returned to him – but he will lose whatever seniority he has in the warehouse area.

Day to Day Interchange

There is no evidence that drivers fill in for absent warehouse employees. There is also no evidence that drivers on a day-to-day basis perform the jobs of warehouse employees. There is some evidence that drivers occasionally assist in loading or unloading trucks, although this evidence is limited to one example. Both HR Representative Glover and an employee testified that in the summertime, when it is warm, the Employer's goal is to keep frozen food in the freezer until the truck is ready to

⁵ The loss of seniority does not affect entitlement to benefits.

leave. Thus, drivers will use a pallet jack (but not a forklift) to pick up frozen food in the freezer (already labeled and ready to go) and to put it in the back of the truck, just before they are ready to depart. In this circumstance, of course, the driver is not working with a warehouse employee, but is loading the truck instead of the warehouse employee.

There is some evidence that warehouse employees assist with driving. However, in order to do so, warehouse employees must be DOT certified and have a commercial driver's license. HR Representative Glover testified that warehouse employees are used "in a pinch," and particularly lately due to a driver shortage. Two examples are warehouse employees Glen Mills and David Emig. Each drove a route for one day in January, 2008.⁶ Glover also estimated that warehouse employee Mills drives 50 percent of his work time, although the Employer offered no documentation to substantiate this claim.

Evidence regarding work-related contact between drivers and warehouse employees appears limited to when drivers perform pre-trip checks on their trucks and gather paperwork, and then when the drivers return from a route and are required to do paperwork (drivers are, of course, driving trucks most of their work day). However, paperwork is completed in the driver's room – a separate area for drivers. It has cubby holes for the drivers to retrieve their paperwork and any other Employer communication. According to an employee who testified, other employees do not use the drivers' room,

⁶ In evidence are Mills' and Emig's timecards for the weeks, including the day each drove a route. These timecards show that Emig was paid \$134.16 in mileage and Mills was paid \$905.07 in mileage. Particularly with regard to Mills, it is difficult to reconcile the mileage paid for one day with HR Representative Glover's testimony that, on an annual basis, the wages of warehouse employees and drivers are in the "same general range."

which is across from the office of the distribution director. According to the warehouse employee, who was a driver, there is very little interaction with warehouse employees because drivers spend at most one hour a day in the warehouse, because during this time the warehouse employees are working, and during some of this time, drivers are “off the clock.” This testimony is contrary to the testimony of HR Representative Glover, who claimed that drivers are physically present in the warehouse and can be in contact with warehouse personnel up to three hours per day or more.

Finally, there is no evidence that transportation maintenance employees ever work in the warehouse, or that warehouse employees ever work in the transportation maintenance area. Work-related contact is limited to when both groups punch in and possibly break times, because transportation maintenance employees work in a building about 100 yards from the warehouse. Thus, there is no work-related interchange between warehouse employees and transportation maintenance employees.

Permanent Transfers

The Employer contends that about half of its current drivers started as warehouse employees, and then transferred to driver positions. The record reveals that prior to 2001, a number of warehouse employees did indeed transfer to truck driver jobs. More specifically, from 1973 through 1979, eight warehouse employees transferred to truck driver jobs; from 1982 through 1988, four warehouse employees transferred to truck driver jobs; from 1991 through 1996, seven warehouse employees transferred to truck driver jobs, in the year 2000, two warehouse employees transferred to truck driver jobs. There have been no transfers since 2000.

On the other hand, transfers from truck driver positions to the warehouse are much less common with one driver transfer in 1999, one in 2003, and one in 2007. In addition, it appears that a transportation maintenance employee transferred to shipping in 2000. I note, however, that the 2007 transfer was not the employee's choice – rather, he testified it was due to a medical issue that disqualified him from driving. It is impossible to determine whether any of the other transfers from truck driver to warehouse employee were voluntary or involuntary, because the Employer's documentation of the transfers does not indicate the reason(s) for them.

Conclusion

On the basis of the foregoing, and the record as a whole, I conclude that the truck drivers and transportation maintenance employees do not share a community of interest with the warehouse employees sufficient to require their inclusion in the unit. This conclusion is based on several facts.

First, the truck drivers and transportation maintenance employees have duties distinct from those of the warehouse employees in the unit, and the drivers and transportation maintenance employees are physically separated from the warehouse employees. Thus, there is no evidence of work-related contact between warehouse employees and transportation maintenance employees. While there is some evidence of work-related contact between warehouse employees and drivers, this contact is limited to the beginning and end of the work day, is further constrained by the fact that drivers complete paperwork in a room separate from the warehouse (albeit next to the warehouse), and finally is incidental to, rather than a major part of, their job functions. In reaching this conclusion I have taken into account the testimony of HR

Representative Glover that truck drivers are in the warehouse up to three hours per day or even more. I note that Mr. Glover does not supervise the warehouse employees or the truck drivers, that he offered no explanation with regard to what truck drivers are doing in the warehouse for nearly half of an eight hour workday, and that all other record evidence is clear that truck drivers deliver food and are away from the Employer's facility most of their work time.

Second, the truck drivers are subject to a different method of compensation and are paid substantially more than the warehouse employees. In reaching this conclusion, I have carefully considered the Employer's claim that both groups are in the "same range" of pay. However, all specific testimony and documentation supports the conclusion that truck drivers make substantially more than warehouse employees.

Third, there is minimal day to day interchange. There is no evidence that truck drivers or transportation maintenance employees fill in for warehouse employees. There is no evidence that warehouse employees fill in for transportation maintenance employees. There is some evidence that warehouse employees drive trucks when the Employer has a driver shortage, but even that interchange is constrained by the fact that not everyone can drive a truck. Rather, a commercial driver's license and DOT certification is required. I note that this record supports a conclusion that only two warehouse employees drive trucks for the Employer, and even they do so when the Employer is short of drivers, and not as a routine part of their days. Finally, with regard to the unsubstantiated claim that one warehouse employee routinely drives a truck for half of his work time, as noted in the Employer's post-hearing brief, this evidence supports a conclusion that this warehouse employee is "dual function." In my view,

evidence that an employee is a dual function employee is not the same as evidence that there is significant day to day interchange.

Finally, an important fact to my conclusion that truck drivers and transportation maintenance employees need not be included in the unit is the fact that the drivers and transportation maintenance employees are separately supervised. I acknowledge that even in the unit sought by Petitioner, various classifications are separately supervised; nevertheless, the separate supervision of drivers and transportation maintenance employees is a factor suggesting that inclusion of them in the unit is not required.

There is, of course, substantial evidence of permanent transfer – especially of warehouse employees transferring to truck driver jobs. However, there has not been a transfer from the warehouse to a truck driver job since the year 2000. While there was a transfer from the warehouse to a truck driver job in 2007, it was involuntary and due to medical restrictions. Finally, these types of transfers are not “the type of periodic temporary transfers or lateral, two-way transfers between departments that may suggest blurred departmental lines and a truly fluid work force with comparable skills.” *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987).

Supporting the Employer’s position on the unit is the fact that all employees have the same benefits, work rules, and parking area. However, there are a few differences related to DOT regulations, and mileage compensation that affect only truck drivers. In any event, the unit sought by Petitioner, excluding truck drivers, and transportation maintenance employees, constitutes an appropriate unit, and a petition is not compelled to seek the most appropriate unit. In these circumstances, I shall exclude the truck drivers and transportation maintenance employees from the unit. *Overnite*

Transportation Co., 331 NLRB 662 (2000); *Cal-Maine Farms, Inc.*, 249 NLRB 944 (1980); *H.P. Watson & Company*, 153 NLRB 1499 (1965).⁷

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time warehouse employees employed by the Employer at its Cedar Rapids, Iowa facility, including inventory control employees, janitors, maintenance employees, order selectors, quality control employees, receiving employees, recoup employees, sanitation employees, shipping employees, forklift operators and lead employees; excluding truck drivers, transportation maintenance employees, office clerical employees, guards and supervisors as defined in the Act, as amended.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are

⁷ The Employer also believes it is significant that in 1992 and 1998, elections were held at the Employer's Cedar Rapids facility among warehouse employees and that included in the unit were truck drivers and transportation maintenance personnel. I find this fact irrelevant.

eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁸

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **United Food and Commercial Workers District Local 431.**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, N.W., Washington, D.C. 20570. **This request must be received by the Board in Washington by 5:00 p.m.**

⁸ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, 330 South Second Avenue, Suite 790, Minneapolis, MN 55401-2221, on or before close of business **February 14, 2008**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

(EDT) on February 21, 2008. The request may be filed through E-Gov on the Board's website, www.nlr.gov,⁹ but may not be filed by facsimile.

Signed at Minneapolis, Minnesota, this 7th day of February, 2008.

/s/ Robert W. Chester

Robert W. Chester, Regional Director
Region Eighteen
National Labor Relations Board
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⁹ To file a request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.